Gerhard Hohloch, Der Wegfall effektiver Staatsgewalt und das IPR, in: Der Wegfall effektiver Staatsgewalt: "The Failed State", Berichte DGVR Bd. 34, Heidelberg 1996

Summary

The Breakdown of Effective State Authority and Private International Law

1. To date, the consequences arising for private law cases from a state's falling into anarchy have not been discussed thoroughly in the doctrine of conflict of laws. The central question is whether, and under what conditions, the law of a failed state can be applied by foreign courts. On the one hand, the subject comes under the rubric of difficulties or impossibility of determining the applicable foreign law; on the other hand, it is related to the scholarly controversies regarding the application of substitute law and substitute contacts.

2. Guidance can be provided by related configurations for which German and foreign law have already gained a considerable amount of experience: identification of the law applicable after a revolution and in civil war; in case of deliberate abolition of private law, complete or partial, because of internal turmoil or revolutionary upheaval, without the passing of new legislation; in the event of military occupation, of occupation or annexation; in case of legislation enacted by a non-recognized government. In the interest of the parties to a dispute, conflict of laws doctrine favours the application of effective law, irrespective of the international legal status of a state to whose legal order reference is made.

3. In legal practice, cases in which the problem described above plays a role are encountered particularly in the fields of family law, law of succession, contracts and torts.

4. The failed state problem does not affect the hard core of the rules of conflict of laws. These rules aim at bringing into application the law best suited for a case on account of its territorial links. Conflict of laws has to look for „private international justice". This aim is also pursued with regard to cases whose links point to the application of the law of a state whose legal system has collapsed and whose judicial system has ceased to work. However, for certain instances the normal conflict rules should be amended by a number of auxiliary rules and contacts. This mixed system of general and auxiliary rules is also justified by the idea of „private international justice". German law does not set forth any specific rules in that regard.

5. In general, the principles of the most significant relationship are not modified if a case has its most significant relationship to a failed state. In the event of a collapse of the administration of justice in a given state, other states are not required not to apply the law that was in force up to that time. Therefore, particularly in the fields of family law and law of succession, the

normal connecting factors are to be relied upon, which amounts to applying the law of the failed state from the time before it fell into anarchy.

6. The principal duty of determining the substantive content of the applicable law is not affected (in a negative sense) by the fact that conflict rules refer to the law of a failed state. Every effort has to be made to establish the rules and practice of the law of a failed state. In case German conflicts law refers in general to the conflict rules of another state, the relevant rules of a failed state not being identifiable, a renvoi, in accordance with the determinations laid down in Articles 3 and 4 of the German Introductory Act to the Civil Code (EGBGB) cannot be deemed to exist.

7. In general, the collapse of a (failed) state as such does not lead to a loss of citizenship. Therefore, there is no need to expand the scope of Article 5, paragraph 2, of the German EGBGB, which deals with stateless persons. The rules on refugees are to be applied solely to persons who, because of the collapse of their home state, meet the requirements for a characterisation as refugees.

8. If there are any doubts about the effectiveness of the law of a failed state, or the contents of that law cannot be ascertained, the law of conflicts has to respond flexibly to the problem of identifying the applicable substantive law. The following substitute solutions can be taken into consideration, primarily in the fields of family law and law of succession, but also with regard to contracts and torts:
   - continued application of the former law, provided it has not been repealed,
   - deliberate continued application of repealed law („petrified statute"),
   - application of new law,
   - application of local rules and customs,
   - application of regional „substitute law".

   Parties to a contract can alleviate the negative consequences of the breakdown of a state's legal system by choosing the law governing the contractual relationship as well as agreeing upon certain suitable, e.g., „petrifying", clauses.

9. Replacing the normally applicable rule with the forum rule (lex fori) constitutes a means of last resort. In the field of personal law (family law, law of succession) the application of the lex fori can be admitted as the last step of a „contacts stairway": the lex fori becomes applicable if none of the above-mentioned solutions proves workable. German conflicts law still does not comprise a written rule giving to the lex fori any precedence over other auxiliary solutions.

10. International procedural law has to respond to the problems of a failed state by strengthening the system of national jurisdiction (auxiliary court

competences). In case that a foreign proceeding has come to a standstill with the result that no court decision can be expected for a considerable period of time, the foreign litispendence does not constitute an obstacle to initiating a new proceeding before domestic courts.